

SERVICE DATE - OCTOBER 14, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42077

ARIZONA PUBLIC SERVICE CO. & PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: October 10, 2003

Peabody Energy Corporation (Peabody) seeks to intervene in this proceeding and requests that the Board enjoin The Burlington Northern and Santa Fe Railway Company (BNSF) from charging Arizona Public Service Co. (Arizona) the common carrier rates currently in place for the rail transportation of coal from Peabody's Lee Ranch Mine (Lee Ranch) in New Mexico to Arizona's Cholla Station electric generating plant (Cholla) near Joseph City, AZ. Peabody seeks the injunction because it claims that its coal suffers a competitive disadvantage when compared to that from another coal mine from which Arizona purchases coal subject to lower, Board-limited rail transportation rates. BNSF opposes Peabody's petition to intervene and objects to Peabody's petition for injunctive relief. Peabody's request for an injunction will be denied, and its request to intervene in this proceeding will be dismissed as moot without prejudice.

BACKGROUND

Peabody's request for an injunction focuses upon a comparison of rail rates charged by BNSF for service from two different New Mexico coal mines — Peabody's Lee Ranch mine and Pittsburgh and Midway's McKinley mine (McKinley) — to Arizona's Cholla plant. The respective rail rates from the two mines are the subjects of separate rate proceedings before the Board: this proceeding (the Lee Ranch Case) and STB Docket No. 41185, Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company (the McKinley Case).

In 1997, the Board, acting on a rate complaint by Arizona, prescribed the maximum reasonable rate for BNSF's McKinley-Cholla movements.¹ Recently, BNSF requested that the Board reopen the

¹ Arizona Pub. Serv. Co. v. Atchison, T.& SF. Ry., 2 S.T.B. 367 (1997), revised, 3 S.T.B.

McKinley Case on the basis of changed circumstances and vacate the rate previously prescribed by the Board. In a decision served May 12, 2003 (May 12 Decision), the Board reopened the McKinley Case to consider the changed circumstances and removed the prescriptive effect of the prior rate order, but directed BNSF not to collect a higher rate during the pendency of the reopened proceeding so as to protect Arizona from a sudden, economically jarring increase in rates that might not be upheld. The Board instructed Arizona and BNSF to keep account of the amounts paid during the pendency of the proceeding and for the appropriate party to make the other party whole at the conclusion of the reopening with respect to amounts paid during the interim, based upon what the Board ultimately finds to be the maximum reasonable rate.

Arizona initiated the Lee Ranch Case on January 30, 2003, by filing a complaint alleging that BNSF's rates for the transportation of coal from Lee Ranch to Cholla are unreasonable. Arizona sought to consolidate this proceeding with the McKinley Case, but the Board denied Arizona's consolidation request in its May 12 Decision.²

On June 16, 2003, Peabody filed a petition to intervene in the Lee Ranch Case, together with a petition for injunctive relief and a request for expedited consideration. In its petition to intervene, Peabody explains that its interest in the Lee Ranch Case "is represented entirely" in its petition for injunctive relief, and that it "has no intention to present Stand-Alone Cost evidence or otherwise participate in that phase of this proceeding." Petition to intervene at 4.

In its petition for injunctive relief, Peabody states that Lee Ranch competes with McKinley for sales of coal to Arizona. The record establishes that Cholla obtains coal from Lee Ranch and McKinley, as well as other sources. BNSF's McKinley-Cholla rail transportation rate for coal currently is held at \$4.21 per ton (the rate that was in effect on January 1, 2003), subject to adjustment (back to the effective date of the May 12 Decision) upon conclusion of the reopened McKinley Case. See May 12 Decision at 7. BNSF's transportation rates for coal from Lee Ranch to Cholla were governed by a contract with Arizona until December 31, 2002. With the expiration of the Lee Ranch-Cholla contract, BNSF published the common carrier rates that are challenged as unreasonable in the Lee Ranch Case. The rate which took effect on January 1, 2003, requires Arizona to pay \$8.62 per ton for BNSF rail service to Cholla.

¹(...continued)
70 (1998).

² A petition for reconsideration of the May 12 Decision is being addressed separately in that proceeding.

Peabody asserts that there is a “gross and artificial disparity”³ between the current Board-limited rate of \$4.21 for McKinley-Cholla and BNSF’s Lee Ranch-Cholla common carrier rates. Peabody claims that this disparity, resulting from the Board’s action of lifting the prescriptive effect of the tariff for transportation from McKinley and ordering the parties to keep account, places it at a competitive disadvantage vis-a-vis McKinley for the sale of San Juan Basin coal to Cholla, and it argues that this disparity would or could prompt Arizona to purchase less, or possibly no, coal from Lee Ranch. Peabody further claims that there are no existing or potential purchasers of Lee Ranch coal who could make up for the possible loss of sales to Cholla. Thus, according to Peabody, the economic harms resulting from the current disparity in rail rates — which Peabody claims include potential lost future profits and a possible reduction of jobs at the mine — will be immediate, substantial, and irreparable.

Peabody requests that the Board order BNSF not to charge rates any higher than the most recent contract rates for transportation of Lee Ranch coal pending the Board’s decision on the reasonableness of the current rates to Cholla pursuant to either a “phasing constraint” to otherwise permissible rates⁴ or the Board’s broad emergency powers at 49 U.S.C. 721(b)(4).

On July 7, 2003, BNSF submitted a reply to Peabody’s petitions opposing Peabody’s request to intervene and objecting to the injunctive relief that Peabody seeks.⁵ Because Peabody is neither a carrier nor a purchaser of rail service, BNSF argues that the mine operator lacks an interest that is protected by the Interstate Commerce Act and therefore should not be permitted to intervene. BNSF further objects that allowing Peabody to intervene would unduly broaden the scope of the proceeding, contrary to 49 CFR 1112.4(a)(2), as it would extend the Board’s inquiry well beyond the scope of the stand-alone cost case initiated by Arizona into the intricacies of the southwestern coal supply market.

In any event, BNSF disputes Peabody’s assertion that the current Lee Ranch-Cholla rail rates undermine Peabody’s ability to compete with other San Juan Basin coal sources such as McKinley,⁶

³ Petition for injunctive relief at 3.

⁴ See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 546-47 (1985) (Coal Rate Guidelines).

⁵ Arizona has not responded to Peabody’s petitions.

⁶ BNSF’s witness, Randall R. Reyff, states that McKinley has been Cholla’s primary (or base) coal supplier, while Lee Ranch has in recent years competed only for incremental or “spot” sales to Cholla. BNSF asserts that, “when viewed in the context of the relevant market segments, Peabody’s
(continued...)

and it dismisses as conjecture Peabody's claim that, absent an injunction, Arizona will substantially reduce or eliminate its Lee Ranch coal purchases. BNSF notes that the rate disparity that Peabody complains of began on January 1, 2003, more than 6 months before Peabody sought relief from the Board. BNSF states that Peabody's petitions, which focus on the alleged disparity in the rates to Cholla that BNSF charges from Lee Ranch and McKinley, have nothing to do with the reasonableness of the current Lee Ranch-Cholla rates by themselves. BNSF argues that the phasing constraint that Peabody invokes is only available when a rail carrier increases the level of a pre-existing common carrier rate, whereas the rates challenged here were preceded by contract rates not subject to the Board's jurisdiction.

Finally, BNSF maintains that 49 U.S.C. 721(b)(4) may not be used to prevent perceived harms that the Interstate Commerce Act does not otherwise authorize the Board to address. Relying on the testimony of Mr. Reyff, BNSF suggests that Peabody's efforts are designed simply to preserve advantages that Peabody's Lee Ranch enjoys in markets that are beyond the Board's regulatory purview.

On July 18, 2003, Peabody responded with a motion for leave to file a rebuttal and a rebuttal. Finally, on August 5, 2003, BNSF responded in opposition to Peabody's rebuttal.⁷

DISCUSSION AND CONCLUSIONS

Peabody seeks to intervene in this proceeding solely to pursue its request for an injunction. As discussed below, there is no basis for granting the injunction — the purpose for which Peabody seeks to intervene here. Thus, Peabody's request to intervene is moot.

Petition for Injunctive Relief

In seeking an injunction, the requesting party must show that: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the

⁶(...continued)

Lee Ranch Mine enjoys a comparative economic advantage [over other coal sources such as McKinley] that, while somewhat less than was the case in 2002, is still material in 2003 and, by any reasonable projection, would continue in 2004." BNSF reply, Verified Statement of Randall R. Reyff (Reyff V.S.) at 8.

⁷ A reply to a reply generally is not permitted under the Board's regulations. 49 CFR 1104.13(c). In this case, however, the additional filings have not delayed the Board's consideration of the matter. In the interest of a complete record, the Board will accept these filings.

injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. See DeBruce Grain, Inc. v. Union Pacific Railroad Company, STB Docket No. 42023, slip op. at 3 n.3 (STB served Dec. 22, 1997), citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). Peabody focuses principally on harm to it, arguing that the current disparity in coal transportation rates to Cholla from McKinley and Lee Ranch places Peabody's Lee Ranch coal at a competitive disadvantage that will cause it to lose business.⁸ Peabody alleges that, in light of the higher rates that Arizona allegedly must pay for Lee Ranch coal versus McKinley coal, Arizona may reduce or eliminate its purchases of Lee Ranch coal, or Arizona may insist that Peabody absorb the increase in rail rates by reducing proportionately the price that Peabody charges for its coal. To address its concerns, Peabody asks the Board to order BNSF to keep the rates for both mines at their pre-2003 levels pending the outcome of the Board's rate reasonableness review.

Harm to Peabody

A party seeking an injunction must show that the harm it faces is both imminent and irreparable. In light of the pending rate challenges involving both McKinley and Lee Ranch — and the fact that the rates that Arizona ultimately will pay for BNSF service from the two mines will not be known until the completion of both rate proceedings — Peabody cannot establish that it will suffer any such harm from a rate disparity pending Board action on the rate reasonableness cases.

Peabody's argument overlooks the fact that both the McKinley rates and the Lee Ranch rates are currently subject to Board review. Although Arizona now pays \$4.21 per ton for rail transportation from McKinley, it is aware that this rate is subject to a future rate reasonableness determination that not only is likely to result in a rate that is either higher or lower than what is now in place, but also will require one of the two parties to make the other whole for transportation going back to the effective date of the May 12 Decision (May 22, 2003). Although comparatively higher, the rates that Arizona now pays BNSF for Lee Ranch-Cholla service are, like the McKinley rates, merely provisional rates that are subject to future Board findings, a keep-account provision, and a make-whole remedy. Consequently, the current postures of both the McKinley Case and the Lee Ranch Case leave Arizona in a position where it must make coal purchasing decisions without knowing for certain what the actual delivered price for the coal from either mine will be, either for the current time period or for the future.

While the injunction Peabody requests might reduce the difference between the provisional rates for McKinley and Lee Ranch coal, it would do nothing to resolve the underlying uncertainty

⁸ As Peabody makes clear, it is the disparity in rates that BNSF charges, and not the Lee Ranch-Cholla rates by themselves, that has prompted it to seek the injunction. See Petition for Injunction at 3.

surrounding what is a maximum reasonable rate from either mine.⁹ As a result, Peabody's allegations of imminent, irreparable harm are speculative, because there is no evidence that Arizona would favor one coal supplier over the other simply because the provisional rate for one is higher than the other. Nor is there any evidence to show that, if the Board were to grant the injunction, Arizona would be likely to purchase more (or any) of its coal from Lee Ranch in the future.¹⁰ To the extent that Arizona's coal purchasing decisions are impacted by rail transportation rate, its decisions presumably will depend upon its own assessment of what the outcome of each rate case is likely to be, rather than whether the provisional rates from McKinley to Cholla are lower than the provisional rates from Lee Ranch. Thus, Peabody has not demonstrated imminent, irreparable harm warranting an injunction.

Harm to Others

Contrary to Peabody's assertion that an injunction would not harm other parties — a position that focuses only on the potential impact of the requested Board action on BNSF and Arizona — an injunction could have broader consequences. Indeed, Peabody's objective is to shift Arizona's coal purchases to Lee Ranch, which would mean steering those purchases away from other mines. Thus, it could result in market disadvantages to other potential suppliers of coal to Cholla.

Other Policy Considerations

Peabody's request for an injunction amounts to an attempt to have the Board exercise its regulatory authority in such a manner as to require rate equalization, or, at a minimum, to maintain prior rate relationships into the future.¹¹ But Congress, in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 35, and in subsequent legislation, effectively steered the ICC (and now the Board) away from the pre-1976 practice of regulating so as to equalize rates. See American Short Line Railroad Ass'n v. United States, 751 F.2d 107, 109-110 (2d. Cir. 1984). Indeed, the antidiscrimination provisions of what is now 49 U.S.C. 10741 were expressly amended to

⁹ Indeed, the Board's May 12 Decision put Lee Ranch and McKinley coal on equal footing by bringing the maximum reasonable rate for McKinley shipments back under review.

¹⁰ Arizona has neither supported nor refuted Peabody's claims here.

¹¹ Peabody's attempt to invoke the phasing constraint of Coal Rate Guidelines is unsupported. As Peabody notes, the Board must consider numerous factors in determining whether to impose a phasing remedy, including "the economic conditions in the coal supply area (and the impact of the rate increase on that region), and supply contracts involved." Coal Rate Guidelines at 547. Peabody's petition does not even address most of the listed factors, but rather focuses only on the potential harm to itself.

sharply limit rate equalization practices. See, e.g., the Conference Report accompanying the Staggers Rail Act of 1980, H.R. Rep. No. 1430, 96th Cong., 2d. Sess. at 104 (1980). Now, instead of having government-mandated rate levels, railroads have the right to set their own rates at levels of their own choosing.

Moreover, in ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress further facilitated railroads' rate-making initiative by repealing the rate suspension procedures under which rate adjustments were sometimes prohibited from taking effect without first being investigated. Congress did not take away the Board's authority to act in advance entirely; where there is good reason for the Board to intervene in rate-making matters, the Board may do so pursuant to 49 U.S.C. 721(b)(4). Indeed, the Board relied upon section 721(b)(4) in the McKinley Case, where injunctive relief was the only way to avoid sudden and unnecessary injury to Arizona once the prescriptive effect of the rate that was in place was lifted.

Here, however, Peabody's injunction petition is not directly linked to the effects of a rate challenge involving its own coal, but is instead intended to mitigate the downstream effects of the Board's decision in another case. Such an approach to rate regulation would be unmanageable, and even counter-productive, in light of the limited scope of the Board's mission under the Interstate Commerce Act, as amended by ICCTA. Under 49 U.S.C. 10701(d) and 10704, the Board's regulatory function is to review the reasonableness of "a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board."

The Board recognizes, of course, that rail rates are significant components of the prices of many goods and services offered throughout the economy, and that any action it may take in a particular rate case may have effects elsewhere. But the Board cannot, and should not have to, address those potentially myriad "ripple effects" when it considers the reasonableness of a rate charged by a railroad for a particular service. Doing so would invite a potentially endless cycle of rate adjustments that could give rise to even more downstream effects. Practically speaking, the only way to prevent such a process from potentially spiraling out of control — other than declining to address such effects in the first place — would be to deprive railroads of the pricing initiative given to them under 49 U.S.C. 10701(c) by freezing their rates. Such an approach to regulation would frustrate the Board's policies and Congressional intent in granting railroads latitude in setting rates. Thus, the relief that Peabody seeks is inappropriate.

Petition to Intervene

Peabody has made clear that it seeks to intervene solely for the purpose of securing an injunction against BNSF. Because Peabody's petition for injunction must be denied for the reasons

discussed above, no purpose would be served by allowing it to intervene in this proceeding. Thus, its petition to intervene will be dismissed as moot without prejudice.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Peabody's motion for leave to file a rebuttal is granted, and its rebuttal is accepted into the record.
2. Peabody's petition for injunction is denied.
3. Peabody's petition to intervene is dismissed as moot without prejudice.
4. This decision is effective as of its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary